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No. 96-1281

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GULF BEACH HOTEL, INC.,
Petitioner,
v.
HILTON INNS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit—which was required to apply the forum state's conflict of law rules to determine what law governs the enforceability of the contract at issue in this diversity action—properly interpreted California law to require the application of the law chosen by the parties to the contract.

RULE 29.6 STATEMENT

Respondent Hilton Inns, Inc. is a Delaware corporation with its principal place of business in California. Hilton Inns, Inc. is a wholly-owned subsidiary corporation of Hilton Hotels Corporation, a Delaware corporation with its principal place of business in California. Hilton Inns, Inc. does not own any interest in any nonwholly-owned subsidiary corporation.

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BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner Hilton Inns, Inc. requests this Court to deny the Petition for Certiorari for the reasons set forth herein.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the application of California Civil Code Section 1646.5 (West 1997). Petitioner also relies upon Article XII, § 232 of the Alabama Constitution, Code of Alabama 1975 Section 10-2A-247(a), Code of Alabama 1975 Section 40-14-4, and the Tenth Amend-

ment to the United States Constitution. These provisions are set forth in the appendix to this brief.

STATEMENT OF THE CASE

In 1992, petitioner Gulf Beach Hotel, Inc. ("Gulf Beach"), an Alabama corporation, repudiated its License Agreement with respondent Hilton Inns, Inc. ("Hilton"), a Delaware corporation headquartered in California. This case arises out of Hilton's suit against Gulf Beach for breach of contract in California. Despite the parties' contractual agreement to be bound by California law, Gulf Beach claims that courts sitting in California were required to bar Hilton's breach of contract action under Alabama's "forum-closing" laws because Hilton inadvertently failed to qualify to do business in Alabama. Based on an interpretation of California state conflict of law rules, both the district court and the Court of Appeals for the Ninth Circuit held that Hilton was entitled to pursue its action in a California forum, because the law of California governed Hilton's right to enforce its contract. That decision rests on a fact-specific application of the state law of California, and raises no issue appropriate for review by this Court.

A. Factual Background

Hilton operates a system of franchise hotels throughout the United States under the Hilton name. In 1986, Hilton and an Alabama joint venture entered into a 20-year License Agreement, which was subsequently assigned to petitioner. The License Agreement was negotiated in California, signed by Hilton in California, and partly performed by Hilton in California. Hilton has no office and no employees in Alabama. None of the negotiations took place in Alabama, and no person residing in Alabama was involved in the negotiations that took place in California. (SER 1-13.)[1]

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[1] Citations to the record set forth herein refer to the Excerpts of Record ("ER") or the Supplemental Excerpts of Record ("SER") filed in the Ninth Circuit.

The License Agreement authorized petitioner to use the Hilton name and to employ the Hilton system of hotel operation with respect to a hotel in Orange Beach, Alabama. In exchange, Gulf Beach agreed to pay Hilton an annual license fee, to pay its share of costs associated with the Hilton reservation system, and to adhere to the policies and procedures set forth in Hilton's operating manual. (ER 2661-68.) In addition, the parties agreed in Paragraph 18 of the License Agreement that their Agreement "shall be governed by and construed in accordance with the laws of the State of California," the state where Hilton maintains its principal place of business. (ER 2665.) The License Agreement also afforded Gulf Beach limited rights to terminate the Agreement. (ER 2669-70.)

In August 1992, without any notice or warning, Gulf Beach sent a letter to Hilton stating that it had "elect[ed] to terminate" the License Agreement some 15 years prior to its date of expiration. (ER 323.) That letter did not set forth any grounds whatsoever for Gulf Beach's repudiation of the contract. (*Id.*) Hilton promptly advised Gulf Beach that it had no right to terminate the License Agreement (ER 324-25), but Gulf Beach proceeded to carry out its unilateral termination of the contract. Gulf Beach removed every reference to Hilton from its hotel operations, withdrew from Hilton's central reservation system, and ceased making the payments to Hilton required under the License Agreement. (ER 2008, ¶ 7.) At the time Gulf Beach repudiated the Agreement, the annual license fee owed to Hilton was approximately $450,000 per year—a contractual obligation worth approximately $6.5 million to Hilton. (ER 2659.)

Hilton initially filed an action in the United States District Court for the Southern District of Alabama on August 31, 1992, in an effort to enjoin Gulf Beach's repudiation of the contract. The following day, the district court declined to grant a temporary restraining order because Hilton had inadvertently failed to comply with

Alabama laws governing the registration of foreign corporations seeking to transact business in Alabama, and Alabama's "forum-closing" laws prevent foreign corporations that have not qualified to do business from enforcing otherwise valid contracts in Alabama courts under certain circumstances. (ER 112-14.) Hilton could not cure an inadvertent failure to comply with these laws through registration with the State subsequent to the execution of the contract.[2] Hilton accordingly sought and obtained the voluntary dismissal of its action without prejudice shortly after it had been filed. (ER 115.)

B. Proceedings Below

Hilton originally initiated this action in the Los Angeles County Superior Court on September 18, 1992. Gulf Beach removed the case to the United States District Court for the Central District of California based upon diversity of citizenship. (ER 1-58.) Gulf Beach then promptly initiated a series of unsuccessful attempts to require the transfer of the action to Alabama, or to require the dismissal of the action in California based upon Alabama's forum-closing laws.

1. Gulf Beach first filed a motion to transfer the case to the Southern District of Alabama pursuant to 28 U.S.C. § 1404(a). (ER 2939.) On November 18, 1992, however, the district court determined that the action should proceed in California, and denied Gulf Beach's motion. (*Id.*) Gulf Beach then filed a motion for summary judgment asserting that the License Agreement was unenforceable because Hilton had failed to qualify to transact intrastate business in Alabama prior to the execution of the License Agreement. (ER 185-305.) Gulf Beach argued that the district court was obligated to ignore California law—the law the parties had chosen to govern their contractual relationship—and apply Alabama law

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[2] Hilton promptly applied to do business in Alabama when it discovered these requirements. (ER 382.)

on this issue. The district court disagreed, and entered an order denying Gulf Beach's motion for summary judgment on May 25, 1993. (ER 384-85.)

As the case proceeded towards trial, Gulf Beach then filed another motion requesting the district court to reconsider its motion to transfer the case to the Southern District of Alabama (ER 2943), which the district court denied on October 13, 1993. (ER 2944.) Frustrated by its inability to secure a transfer of the case to Alabama through conventional means, Gulf Beach next filed a Voluntary Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court for the Southern District of Alabama ("Bankruptcy Court") (ER 1924-25) and a Notice of Removal of this action to the United States District Court for the Southern District of Alabama. (ER 1926-32.) On June 15, 1994, the Bankruptcy Court issued an order remanding the action back to the Central District of California and lifting the automatic stay in bankruptcy to permit the case to proceed to trial in California. (SER 155-59.) The following month, Gulf Beach again filed a *second* motion for reconsideration of its request for a transfer (ER 2950), which the district court denied. (ER 2951.)

The district court also ruled in Hilton's favor on issues of liability. Hilton sought summary judgment on its breach of contract claim based on its view that the undisputed facts established that Gulf Beach had no contractual basis for terminating the License Agreement. The district court granted that motion, and entered its Interlocutory Summary Judgment of Liability on November 12, 1993. (ER 1766-71.) The parties proceeded to try the issue of damages to a jury in October of 1994. The jury awarded Hilton nearly $7 million in damages (ER 2653-54), and Gulf Beach appealed. (ER 2934-37.)

2. On appeal, Gulf Beach did not challenge the district court's denial of its motions to transfer the case to the Southern District of Alabama, and its determina-

tion that California was a proper forum for litigation of the dispute. It nevertheless did challenge the district court's denial of Gulf Beach's motion for summary judgment seeking to enforce the Alabama forum-closing laws in California. It also sought review of the district court's decision on liability.

In a unanimous, unpublished memorandum opinion, the Ninth Circuit affirmed the district court's determination that a California court would apply California law and hold that the License Agreement was enforceable. (Appendix to the Petition for Certiorari at A-2, A-3.) ("Pet. App.") Following this Court's decision in *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941), the Ninth Circuit held that federal courts sitting in diversity cases must apply the forum state's conflict of law rules. The Ninth Circuit accordingly turned to California law to determine whether the enforceability of the parties' contract should be governed by the law of California or the law of Alabama. The Ninth Circuit determined that California courts would apply California law in this situation based upon that state's express public policy—codified by the legislature—requiring the enforcement of California choice of law clauses in commercial agreements involving more than $250,000. That policy, set forth in Cal. Civ. Code § 1646.5, provides that the parties to a contract involving not less than Two Hundred Fifty Thousand Dollars may agree that California law shall govern their rights and duties under the contract "whether or not the contract, agreement, or undertaking or transaction bears a reasonable relation to this state." (*Id.* at A-2.)

The Ninth Circuit rejected Gulf Beach's contention that "a proper choice of law analysis would include consideration of Alabama's strong policy of prohibiting foreign corporations not registered in the state from enforcing contracts against Alabama citizens" based on its determination that the California statute was designed to super-

sede the interest of other states in the controversy. (Pet. App. at A-2.) The Ninth Circuit upheld the district court's denial of Gulf Beach's motion for summary judgment "[b]ecause under California substantive law Hilton is not precluded from maintaining this action despite its failure to register in Alabama prior to the execution of the License Agreement." (*Id.* at A-3.)

The Ninth Circuit accordingly found it unnecessary to reach alternate grounds for affirmance on this issue also advanced by Hilton. First, Hilton argued that California law should apply under Section 187 of the Restatement of Conflicts (Second) as interpreted by the California Supreme Court even in the absence of Cal. Civ. Code § 1646.5. (Appellee's Brief at 24-27.) Hilton argued that under *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 466 (1992), California courts must enforce the parties' choice of law if the "chosen state has a substantial relationship to the parties or their transaction," where it would not conflict with California policy to do so. Second, Hilton fully presented and preserved the argument that the Alabama forum-closing law would not bar its action, even in federal court in Alabama, because the License Agreement represented an interstate transaction. (*See* Appellee's Brief at 27.) *See also Leasing Service Corp. v. Hobbs Equipment Co.*, 707 F. Supp. 1276, 1286-87 (N.D. Ala. 1989). (Petitioner's suggestion in its Petition at 8-9, that this issue was conceded is simply incorrect.) There is accordingly no merit to petitioner's claim (Pet. at 3) that this Court's reversal of the Ninth Circuit's interpretation of the California statute at issue would foreclose any recovery for Hilton under the contract as a matter of law.

With respect to the issue of liability, the Ninth Circuit reversed the district court's decision to enter summary judgment in favor of Hilton. The court determined that there were genuine issues of material fact concerning the reasonableness of various revisions to Hilton's operating

manual that Gulf Beach invoked during the course of litigation in an effort to justify its decision to terminate the Agreement. (*Id.* at A-3, A-4.) The Ninth Circuit remanded the case to the district court for further proceedings on the issue of liability.

REASONS FOR DENYING THE WRIT

Petitioner requests this Court to review the Ninth Circuit's interpretation of a California statute governing the enforceability of choice of law clauses in contracts exceeding $250,000. There is absolutely no basis under this Court's rules to grant review of that state law question. This Court ordinarily defers to the lower courts' interpretations of state law, and there is no reason to depart from that course here. The decision of the Ninth Circuit does not raise any constitutional issues, or conflict with any decision of this Court or any other circuit, as petitioner mistakenly contends. The Ninth Circuit properly determined that California public policy permitted Hilton to enforce the terms of its contract in the courts of California regardless of whether Hilton could have enforced its rights in the courts of Alabama.

I. THE NINTH CIRCUIT CORRECTLY RESOLVED AN ISSUE OF STATE LAW IN A MANNER THAT DOES NOT RAISE ANY CONSTITUTIONAL QUESTIONS

A central issue in this case is whether the enforceability of the parties' contract should be governed by the law of Alabama—the place where petitioner's hotel was located —or the law of California—the law chosen by the parties in their agreement, the place of Hilton's principal place of business, and the place where the contract was negotiated. There is no dispute that the Ninth Circuit properly looked to the law of California to resolve this conflicts issue, because a federal court exercising diversity jurisdiction is required to render judgments in conformance

with the state courts of the forum. *See, e.g., Klaxon,* 313 U.S. at 496-97 (reversing Third Circuit decision in a Delaware diversity action because it applied New York law without determining what law courts of Delaware would have applied under Delaware conflicts principles). The sole question in this case, therefore, is whether the Ninth Circuit erroneously construed Cal. Civ. Code § 1646.5 to require the application of California law in the circumstances of this case.

That issue is simply not appropriate for consideration in this Court. As this Court held in *Klaxon,* "[t]his Court's views are not the decisive factor in determining the applicable conflicts rule" as the forum state is "free to determine whether a given matter is to be governed by the law of the forum or some other law." 313 U.S. at 497. *See also* 313 U.S. at 497 (declining to decide whether Delaware would apply its own law or the law of New York and stating that it was appropriate to "leave this" issue to the Court of Appeals on remand). This Court ordinarily defers to a lower federal court's construction of a state statute, *see, e.g., Planned Parenthood v. Casey,* 505 U.S. 833, 881 (1992), and there is no basis whatsoever to grant review of that state law issue here.

First, petitioner contends that the Ninth Circuit misconstrued California law because it should have applied the multi-factor test set forth in the Restatement (Second) Conflict of Laws ("Restatement") § 187 instead of a "mere California statute" that was "never cited or relied upon by either party." (Pet. at 9.) That contention lacks any factual or legal basis. Although *petitioner* "never cited" the controlling California statute relied upon by the Ninth Circuit, Hilton cited that statute in its brief in the district court, and on five separate pages of its brief in the Ninth Circuit. (Appellee's Brief at 1, 21, 23, 24, 26 (October 18, 1995.)) And the opening sentence of Hilton's argument on this issue contended that "[t]he

district court was required pursuant to Cal. Civ. Code Section 1646.5 to apply California law, not Alabama law, in determining the enforceability of the License Agreement." (*Id.* at 21.) Moreover, it is obvious that the Ninth Circuit was required to apply conflicts principles established in California statutes in preference to principles articulated in a treatise that has not been codified by the California legislature. In *Nedlloyd Lines*, for example, a California Supreme Court decision relied upon by petitioner, the Court stated that "[c]hoice-of-law issues" for contracts subject to the Uniform Commercial Code "are governed by California Commercial Code Section 1105"—a conflicts principle codified by the legislature—even though a variety of other contracts are governed by the Restatement principles under California common law. 3 Cal. 4th at 645 n.2.[3]

Second, petitioner has failed to cite any language in the statute, or California precedents interpreting that Act, in support of its contention that the "California legislature cannot have intended to modify" the application of Section 187 of the Restatement in California courts. (Pet. at 9.) In fact, the language of the statute strongly supports the Ninth Circuit's conclusion that the law was designed to establish an express state policy requiring California courts to enforce California choice of law clauses in contracts in excess of $250,000 even where another state with a substantial relationship to the contract would not enforce the clause. The statute states in explicit terms that

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[3] Contrary to petitioner's contention, *Nedlloyd Lines* is fully consistent with the Ninth Circuit's decision. *Nedlloyd Lines* applied common law Restatement principles to the choice of law question because the contract at issue was not governed by any statutory rule. The Court had no occasion to interpret Cal. Civ. Code § 1646.5 because the parties in *Nedlloyd Lines* had selected Hong Kong law, and Section 1646.5 only applies to contracts that select California law. In addition, the Ninth Circuit would have been required to select California law in this case even if it had applied the common law test adopted in *Nedlloyd Lines*. (*See* Appellee's Brief at 24-27.)

parties "may agree that the law of this state *shall* govern their rights and duties" even where the transaction does not "bear[] a reasonable relation to this state"; that "undertakings selecting California law . . . shall be valid, enforceable and effective" even if they were "entered into . . . before the effective date"; and that "actions and proceedings commencing in a court of this state" must be governed by this section if commenced prior to the effective date of the section. Cal. Civ. Code § 1646.5 (emphasis added).

Petitioners' claim that this statute should only be read to "magnanimously open[] California courts to certain contract disputes involving $250,000 or more" finds no basis in the language. (Pet. at 8.) The section reflects choice of law principles, not just a grant of jurisdiction.[4] In addition, petitioner's effort to paint the Ninth Circuit's interpretation as one that leads to absurd results also fails. Petitioner's contention that this interpretation would permit parties to select Nevada law and thereby operate gambling casinos in Los Angeles is far off the mark. (Pet. at 4.) Section 1646.5 only requires the enforcement of a choice of law clause that selects the law of California—law that obviously conforms to the state's public policy. California courts would accordingly have no obligation to apply Nevada law under Section 1646.5, and would be free to enjoin gambling operations in Los

[4] This characterization finds further support in California decisions interpreting a related provision, Cal. Civ. Code § 1646. That section adopts a general rule that "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed," and California courts have interpreted this section to establish the relevant considerations for deciding conflict of law issues in California. *See, e.g., Hambrecht & Quist Venture Partners v. American Medical Int'l, Inc.*, 38 Cal. App. 4th 1532, 1540 (1995); *Gitano Group, Inc. v. Kemper Group*, 26 Cal. App. 4th 49, 56 n.4 (1994). Section 1646.5 is an exemption to this general conflict of law rule applicable to large contracts pertaining to various commercial subject matters that select California as the governing law.

Angeles, without regard to laws that make gambling lawful in the State of Nevada. Given the unequivocal language of the statute—and petitioner's failure to cite a single California case that construes the statute in any other way—it would have been clear error for the Ninth Circuit to apply Alabama law on the facts of this case.

Third, this case does not present any constitutional issue. Petitioner never advanced *any* constitutional claim in the Ninth Circuit, and its belated reliance on the Tenth Amendment is completely misplaced. Petitioner contends that if the "collective brain trust of the California legislature" intended to foreclose the application of Alabama law here "when it enacted Section 1646.5, it would nevertheless fail, miserably, to effect that purpose in the wake of the Tenth Amendment to the United States Constitution." (Pet. at 9-10.) Without citing a single case, petitioner claims that the "legislature of the State of California" has no "right to rob the State of Alabama" of its right to have Alabama public policy applied by the courts of California. (*Id.* at 10.) According to petitioner, "[i]f the Tenth Amendment means what it says, the public policy of Alabama is not subject to dilution or dissolution by the State of California." (*Id.*)

This Court held in *Klaxon*, however, that the policy of the forum state does control the choice of law, and there is certainly nothing in the Tenth Amendment that compels the State of California to require its courts to apply the public policy of Alabama in preference to the public policy of California.[5] In conformance with its text, this

[5] This Court held in *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 500 (1939) that where two states have conflicting policies, "neither is bound, apart from the compulsion of the full faith and credit clause, to enforce the laws of the other, . . . and the law of neither can by its own force determine the choice of law to be applied in the other." Petitioner presumably chose not to invoke the full faith and credit clause or the Due Process Clause because those constitutional limitations on a state's

Court has interpreted the Tenth Amendment to impose limits on the federal government's power with respect to the states, *see, e.g., Fry v. United States,* 421 U.S. 542, 547 n.7 (1975); *United States v. Darby,* 312 U.S. 100, 124 (1941), and not to impose limits on a state's legislative power with respect to other states. In addition, petitioner waived any claim that the California choice of law rule is unconstitutional by failing to present that issue to the Ninth Circuit. (*See* Appellant's Brief at 17-25; Appellant's Reply Brief at 1-9.) *See, e.g., Lawn v. United States,* 355 U.S. 339, 362 n.16 (1958) (refusing to consider an issue not raised below).

II. THE NINTH CIRCUIT RULING DOES NOT CONFLICT WITH THE JUDGMENTS OF THIS COURT OR ANY OTHER CIRCUIT

As set forth, petitioner does not cite a single case that has construed the California statute at issue in a manner at odds with the Ninth Circuit's decision. Petitioner nevertheless contends that the lower court's ruling "conflicts" with decisions that have upheld the enforcement of the Alabama forum-closing laws. In each of the cases cited by petitioner, however, the federal courts applied Alabama law because the cases were filed in federal courts in Alabama, and the law of the forum controlled. These cases say nothing whatsoever about California conflict of law principles or, for that matter, the conflict of law

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choice of law are satisfied so long as the state has a "significant contact . . . creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 312 (1981) (plurality opinion); 449 U.S. at 332 (dissenting opinion) (adopting same standard). That standard is readily satisfied here because petitioner has concluded that California has a "substantial relationship" with this contractual dispute (Appellant's Brief at 21), and it is not "arbitrary" or "unfair" to apply the law chosen by the parties. *See, e.g., Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 821 (1985) (remanding case for consideration whether it was "arbitrary or unfair" to apply Kansas law to parties who *had not* selected that law in their contracts).

principles of the home state of the foreign corporation involved in any of these cases.

First, the Ninth Circuit did not "disregard[] a judgment of this honorable Court" in *Chattanooga Nat'l Bldg. & Loan Ass'n v. Denson*, 189 U.S. 408 (1903) as petitioner contends. (Pet. at 3.) In *Denson*, a foreign corporation that had not registered to do business in Alabama sought to enforce a contract with an Alabama resident by filing suit in federal district court in Alabama. 189 U.S. at 408-09. This Court held that the foreign corporation could be "repelled from court" in Alabama because the contract it sought to enforce was made in violation of Alabama law. *Id.* at 416. The sole issue in *Denson* was whether the foreign corporation had in fact engaged in acts that constituted "doing . . . business" in the state, within the meaning of Alabama law. *Id.* at 413. Nothing in *Denson* purports to require state or federal courts in California to disregard the public policy of California and to dismiss any contract action that would contravene the forum-closing policy of Alabama. That issue was simply not presented in *Denson*.

Second, that issue was also not resolved in any of the three decisions of the courts of appeals cited by petitioner. (*See* Pet. at 3.) Petitioner correctly contends that the Fifth and Eleventh Circuits have "upheld enforcement of the same Alabama constitutional provision in federal courts in diversity cases," but neglects to mention that all three of those cases concerned diversity actions filed in Alabama district courts, where there could be no question but that the policy of Alabama should govern the outcome. (*Id.*) *See Advance Indus. Secur., Inc. v. William J. Burns Int'l Detective Agency*, 377 F.2d 236, 238 (5th Cir. 1967) (holding that Alabama law barred a Florida corporation's suit in federal district court in Alabama because it had not qualified under the forum-closing statute); *Continental Tel. Corp. v. Weaver*, 410 F.2d 1196 (5th Cir. 1969) (dismissal of action brought

by foreign corporation in district court in Alabama); *S&H Contractors v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1509 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) (dismissing suit for breach of contract filed in the federal district court in Alabama, relying on the Alabama forum-closing statute).

Nothing in those decisions suggests that the Alabama law has sufficient force to bar enforcement of the contract in any forum. In fact, in *S&H Contractors*, a district court in Alabama held that a foreign corporation could not pursue an action in federal court in Alabama, and a district court in Georgia enjoined arbitration proceedings, finding that the contract was void under Alabama law. In a consolidated appeal, the Eleventh Circuit declined to affirm the decision of the Georgia district court to enjoin arbitration proceedings on that theory. The Eleventh Circuit concluded that the "issue whether the contract . . . is void for all purposes presents extremely difficult questions of state law" and held that under federal law, the foreign corporation had waived its right to arbitrate by unduly delaying its demand for arbitration. 906 F.2d at 1514.

Moreover, the decisions relied upon by petitioner simply do not conflict with the holding of the Ninth Circuit in any respect. Each of those decisions, like the decision of the Ninth Circuit at issue here, is premised on a federal court's obligation to apply the law of the forum under *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938). If the Ninth Circuit had done what petitioner demands—disregarded the California statute in favor of Alabama law—it would have violated the principles established by this Court in *Klaxon*. This Court emphasized in *Klaxon* that the key in diversity cases is to ensure "uniformity within a state" where the federal court sits—not uniformity with federal courts hearing diversity cases in other states. 313 U.S. at 496. As this Court stated: "Whatever lack of uniformity this may produce between federal courts in

different states is attributable to our federal system, which leaves to a state, within the limits permitted by Constitution, the right to pursue local policies diverging from those of its neighbors." *Id.* As in *Klaxon*, any "lack of uniformity" between the decisions of federal courts in Alabama to enforce the forum-closing policy of that state, and the decision of a federal court in California to enforce California policy instead, represents a permissible attribute of "our federal system." *Id.*

CONCLUSION

For the reasons set forth, respondent respectfully requests this Court to deny the petition for certiorari.

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Dated: March 14, 1997

APPENDIX

United States Constitutional Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Alabama Constitution, Article XII, § 232. Foreign corporations doing business in state.

No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the state of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax.

Alabama Code § 10-2A-247 (1975). Transacting business without certificate of authority.

(a) All contracts or agreements made or entered into in this state by foreign corporations which have not obtained a certificate of authority to transact business in this state shall be held void at the action of such foreign corporation or any person claiming through or under such foreign corporation by virtue of said void contract or agreement; but nothing in this section shall abrogate the equitable rule that he who seeks equity must do equity; provided, that the failure of a foreign corporation to obtain a certificate of authority shall not impair the validity of any contract or agreement heretofore or hereafter entered into and consisting of a mortgage upon real

property or an interest in real property in this state, and the note secured thereby, where the mortgage is insured by the Federal Housing Administration or guaranteed by the Veterans Administration, if said foreign corporation shall have thereafter obtained a certificate of authority. In all actions against such foreign corporation, or against any person claiming under such foreign corporation by virtue of such void contract, the foreign corporation or such person claiming under it shall be held to be estopped from setting up the fact that the contract or agreement was so made in violation of law. In all actions against foreign corporations which have not obtained a certificate of authority, the summons or other process may be served upon the officer, agent or employee of the foreign corporation who acted for or represented such foreign corporation in making the contract or agreement sued upon. (Acts 1980, No. 80-633, p. 1094, § 135.)

Alabama Code § 40-14-4 (1975). When contract void; qualification by foreign corporation to do business in state.

All contracts made in this state by any foreign corporation which has not first complied with the provisions of Section 40-14-1 through 40-14-3 shall, at the option of the other party to the contract, be wholly void at the action of such foreign corporation or any person claiming through or under such foreign corporation by virtue of such contract, unless said contract, heretofore or hereafter executed, consists of a mortgage upon real property or an interest in real property in this state, and the note secured thereby, where the mortgage is insured by the Federal Housing Administration or guaranteed by the Veterans Administration, and unless said foreign corporation shall have thereafter qualified to do business in this state. Before so qualifying, such foreign corporation shall be required to pay all qualification fees or admission taxes required by Sections 40-14-1 through 40-14-3 for all years or parts of years which it transacted business in

this state, together with such interest and penalties thereon as may be assessed in accordance with law. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 342; Acts 1970, Ex. Sess., No. 34 p. 3657.)

California Civil Code § 1646.5 (West 1997):

Notwithstanding Section 1646, the parties to any contract, agreement or undertaking, contingent or otherwise, relating to a transaction involving in the aggregate not less than two hundred fifty thousand dollars ($250,000), including a transaction otherwise covered by subdivision (1) of Section 1105 of the Commercial Code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not the contract, agreement, or undertaking or transaction bears a reasonable relation to this state. This section does not apply to any contract, agreement, or undertaking (a) for labor or personal services, (b) relating to any transaction primarily for personal, family, or household purposes, or (c) to the extent provided to the contrary in subdivision (2) of Section 1105 of the Commercial Code.

This section applies to contracts, agreements, and undertakings entered into before, on, or after its effective date; it shall be fully retroactive. Contracts, agreements, and undertakings selecting California law entered into before the effective date of this section shall be valid, enforceable, and effective as if this section had been in effect on the date they were entered into; and actions and proceedings commencing in a court of this state before the effective date of this section may be maintained as if this section were in effect on the date they were commenced.